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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term 1937

No. 365

NOAH ADAIR,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Respondent.

RESPONDENT'S REPLY TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

Petitioner's main argument is predicated upon the statement that the original proceedings of the debtor under Section 75 and Section 75 (s) of the Bankruptcy Act, although dismissed, were subsequently reinstated under subsection (s) of Section 75 as amended August 28, 1935, and that the reinstatement validated all proceedings theretofore taken, including disbursements made by petitioner.

This entire argument is based upon an erroneous assumption of the existence of certain facts stated in the petition and brief. Before attempting to answer the argument we desire to point out these erroneous assumptions.

(a) **Original Proceeding of Debtor Not Dismissed Because Original Subsection (s) of Section 75, Bankruptcy Act, Held Unconstitutional.**

On page 4 of the petition and page 17 of the brief it is stated that it is apparent that the original proceedings of the debtor Cuccia were dismissed because of the declaration by the Supreme Court that subsection (s) of Section 75 was unconstitutional. There is nothing in the record to justify this assumption. The statute involved was amended on August 28, 1935, almost two months *before* the dismissal and at the time of dismissal that ground was not available.

The Circuit Court of Appeals in its opinion [R. 93] referred to its own decision in the case of *Bank of America National Trust & Savings Association v. Cuccia,* 90 Fed. (2d) 100, decided May 4, 1937, stating that it was not concerned with the reinstatement of Cuccia's proceedings. A reference to the opinion, however, which is cited in petitioner's brief, indicates that the motion to dismiss which was granted October 14, 1935, was upon the ground that no composition agreement could be had between the debtor and his creditors. No question of constitutionality was involved.

(b) **Debtor's Proceedings Were Not Reinstated After Dismissal.**

On page 6 of the petition and page 17 of the brief it is stated that after dismissal the debtor's proceedings were reinstated. This does not appear from the record but petitioner attempts to justify his statement by a reference to the decision in *Bank of America National Trust & Savings Association v. Cuccia, supra,* and the contention that the Circuit Court of Appeals should have required a supplemental record to show the reinstatement.

A reference to the decision cited shows that the Circuit Court of Appeals stated in its opinion that the debtor petitioned the district court for leave to file a *new petition* under Section 75 and this leave was granted. The court states that the debtor filed such new petition "thereby reinstating the proceeding which had been dismissed." Whether or not this conclusion by the Circuit Court of Appeals is correct is not finally determined because a petition for rehearing was granted on July 1, 1937. (See Advance Sheet, Vol. 90, Fed. (2d) No. 2, p. VII, Rehearing Table.)

In any event, the record before this court does not show that there was any reinstatement of the original proceeding, nor does it show that petitioner made any attempt in the Circuit Court of Appeals to bring before that court the record upon which petitioner might rely to establish such a contention.

(c) **Moneys Paid by Petitioner to Cuccia Were Not Used in Cultivating and Harvesting the Mortgaged Crop.**

The third erroneous assumption of fact stated at page 3 of the petition and page 16 of the brief is that $1290.33 of the funds paid by petitioner to Cuccia was for labor performed and expenses incurred in cultivating and harvesting the mortgaged crop. The record cited by petitioner [R. 17, 18] does not substantiate the statement. The account filed by petitioner [R. 17, 18] does not indicate that *any* of the disbursements were for the cultivation and harvesting of the mortgaged crop, but on the contrary, indicates that the disbursements were all made during a period of about ten months *after* the crop was harvested and sold. The record does show, however, that at the time of the hearing in the district court petitioner testified that approximately $400.00 was used to pay for picking the grapes [R. 48]. The rest was used for care of the *land* and expenses of administration.

QUESTION INVOLVED.

It is respondent's contention that the only question involved in this case is whether or not a Conciliation Commissioner, after the filing of a petition under Section 75 of the Bankruptcy Act, may harvest the crops growing upon lands of the farmer debtor which are subject to a valid crop mortgage executed more than four months prior to bankruptcy and expend the proceeds without regard to the provisions of the crop mortgage, depriving the mortgagee of his security.

ARGUMENT.

Petitioner has argued five separate specifications of error and we will reply to the argument under each specification.

First Specification of Error.

Petitioner's argument is based entirely upon an erroneous assumption that an order of reinstatement of the debtor's original proceedings was made on March 16, 1936. As we have previously pointed out no such reinstatement was ever made, and in any event, if any other proceedings were material to the determination of this case by the Circuit Court of Appeals, petitioner should have brought before that court, by proceedings for diminution of the record, whatever was deemed necessary for that purpose.

Second Specification of Error.

The petitioner received the proceeds of crops subject to a valid crop mortgage and deposited them in a bank *in his own name* with that of the debtor [R. 17] and thereafter wrote checks upon the bank account [R. 39]. By taking possession of the funds he stepped beyond his jurisdiction as conciliation commissioner and referee and usurped the functions of a trustee in bankruptcy. Whether he be considered as a trustee in bankruptcy or a receiver, as contended by petitioner, no disbursement of the funds could be valid unless based upon a previous order of court. No order was ever obtained nor was any notice of any disbursement ever given to any creditor [R. 43].

Petitioner's assertion that he acted in utmost good faith may well be questioned. In November, 1934, he refused to give a report of the proceedings upon a request therefore [R. 44-46]. Although demand for an accounting of the proceeds of the crop was made by the crop mortgagee [R. 14] he refused to render any account until compelled by court order [R. 16]. The account itself [R. 17, 18] is, to say the least, vague and indefinite. No vouchers were filed or produced at the hearing, nor even the cancelled checks upon the account [R. 50].

Fourth Specification of Error.

Petitioner's argument again is predicated upon an erroneous statement of fact. As we have previously pointed out, the most that can be claimed is that $400.00 was used to pay the cost of harvesting the crop, the balance used for subsequent care of the land and expenses of administration.

Even as to the $400.00 the judgment of the Circuit Court of Appeals is the only judgment that properly could be rendered because as pointed out in the opinion [R. 91] and as provided in the mortgage [R. 57, 58], the mortgage obligated Cuccia to harvest the crop and prepare it for market and when so prepared, ***deliver it to the mortgagee.*** Cases cited by petitioner are not applicable nor even analagous to the facts of the case at bar.

Fifth Specification of Error.

Petitioner concedes that prior to the enactment of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203), respondent would have been entitled to recover the full proceeds of the crop from petitioner, but he contends that the enactment of Section 75 and the subsequent enactment and amendment of subsection (s) of Section 75 has completely changed the law and that the former principles no longer control. Rather than point out the particular provision of the statute or decision which might justify the contention, the argument is, in effect, a plea to this court that unless it determines that a conciliation commissioner may appropriate the security of a creditor for the benefit of the debtor or other creditors, the statute will be unworkable.

It is respondent's contention that in so far as the facts of this case are concerned, the elementary rule that a creditor is entitled to his security is still the law, and that petitioner, even though considered as a *de facto* trustee in bankruptcy or a receiver, having unlawfully appropriated funds in his possession belonging to the creditor, is personally liable therefore.

Petitioner having conceded the law prior to the enactment of Section 75 (Petitioner's Br. p. 31), it may briefly be demonstrated that the new statute does not permit of the construction claimed. Subsection (k) of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203) as it existed at the time of the acts complained of, provides as follows:

"(k) *Binding effect of confirmation; impairment of liens of secured creditors.* Upon its confirmation a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided,* That such composition or extension shall not reduce the amount of nor impair the lien of any secured creditor, but shall affect only the time and method of its liquidation."

There could be no question of the time or method of liquidation of the security. The security was *liquidated* by a sale of the crop by the petitioner. It is impossible to say that the use of the proceeds, other than the payment upon the debt secured, does not reduce or impair the lien. The use of the proceeds for anything except payment upon the debt constituted a confiscation of the security. The mortgage required delivery of the harvested crops to the mortgagee. After sale, the use of *any* of the proceeds for any purpose other than payment on the debt, constituted a *taking* of the security, whether the money was used to pay a debt incurred by the debtor in harvesting the crop or for future care of the land or for expenses of administration, or any of the other items shown in the account.

Not only does the statute itself prevent impairment of the plan, but this court has held that the Congress does not have the power under the Constitution to enact legislation which would permit any substantial impairment of a mortgagee's security.

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; 79 L. Ed. 1593; 55 S. Ct. 854.

Wright v. Vinton Branch of the Mountain Trust Bank, 81 L. Ed. 487 (Advance Opinions).

Petitioner refers to the provisions of the statute requiring payment of rental, arguing that as the farm debtor must pay rental while he remains in possession, he must be allowed to use part of the income for that purpose. The fallacy of the argument lies in the fact that the security here consisted of perishable crops. The mortgagee of the crops would not be entitled to rental paid upon the land and of course when the crop was sold the security was liquidated. Furthermore, no order requiring the debtor to pay rental was ever made.

The petition and brief seek to present this matter as one which should be determined under the provisions of Subsection (s) of Section 75 of the Bankruptcy Act as amended August 28, 1935. The crop was sold and the money all disbursed *prior* to the enactment of the amended statute and its provisions are immaterial to the issues of the present case.

CONCLUSION.

It is respectfully submitted that the petition fails to show any error in the decision of the Circuit Court of Appeals and the petition should therefore be denied.

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RESPONDENT'S BRIEF ON CERTIORARI

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Respondent.

RESPONDENT'S BRIEF ON CERTIORARI

The brief heretofore filed by respondent was filed in opposition to the petition for certiorari and directed mainly to points considered to indicate the insufficiency of the petition. As the court has now granted the petition, respondent feels it desirable to present more fully the merits of the appeal in the first instance. Reference will be made in the course of the argument to points urged by petitioner.

Statement of the Case.

The statement of the case in petitioner's brief is incomplete and in some respects inaccurate. A complete statement of the case is necessary to a proper determination of the issues.

Andrea Cuccia filed a petition under Section 75 of the Bankruptcy Act on August 4, 1934 [O. R. (Original Record) p. 4; P. R. (Printed Record) p. 68]. The proceedings were referred to Noah Adair, the petitioner herein, as Conciliation Commissioner for the County of San Bernardino, State of California, on August 6, 1934 [O. R. p. 35, P. R. p. 18]. The debtor was unable to make an agreement of composition or extension and on January 7, 1935, filed an amended petition under Subsection (s) of Section 75 of the Bankruptcy Act and was adjudicated a bankrupt, the proceedings being referred to D. W. Richards, Referee in Bankruptcy for San Bernardino County [O. R. p. 36, P. R. p. 69]. After proceedings before the Referee he signed an order of dismissal on April 16, 1935 [O. R. p. 37, P. R. p. 74]. A petition to review the Referee's order was filed [P. R. p. 72], but the proceedings were subsequently dismissed by the District Court on October 14, 1935 [O. R. p. 13, P. R. p. 76].

After the filing of the debtor's petition on August 4, 1934, the Conciliation Commissioner harvested the crop

of grapes growing upon the debtor's property and received the sum of $1,437.37 from the sale of those crops [O. R. pp. 17, 26; P. R. pp. 8, 13]. This fund, as shown by the Conciliation Commissioner's account [O. R. p. 13, P. R. p. 8], was used by the Conciliation Commissioner in the payment of claims for labor upon the real property of the debtor after the filing of the debtor's petition, payments to the debtor for living expenses, and various expenses of administration.

Prior to February 6, 1936, respondent had demanded an accounting from the petitioner for the proceeds of the 1935 crop [O. R. p. 14, P. R. p. 6]. This account was not made and on February 6, 1936, respondent filed a petition for an order directing an accounting [O. R. p. 10, P. R. p. 4] and on the same day the District Court made an order directing the Conciliation Commissioner to account [O. R. p. 16, P. R. p. 7]. Pursuant to this order the Conciliation Commissioner filed a document purporting to be an account [O. R. p. 17, P. R. p. 8], which was not verified nor accompanied by any vouchers. Respondent filed verified objections and exceptions to the account [O. R. p. 19, P. R. p. 9], which alleged in substance that respondent held a chattel mortgage upon the crops growing upon the real property of the debtor; that the Conciliation Commissioner had harvested the crops with full knowledge of the mortgage and that respondent at no time had any knowledge or notice of any order made for the disbursement of any of the proceeds of the sale of the crops.